SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 931

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Petitioner,

v.

STATE TAX COMMISSION OF MISSOURI, HUNTER PHILLIPS, Chairman, CARL E. DAVIS and J. RALPH HUTCHISON, Members, J. R. TOWSON, Secretary,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED

1. Whether a state deprives an interstate company of property without due process of law when the state's tax assessing agency, in determining the value of the company's property within the state for ad valorem property tax purposes, rejects the method of valuation presented

by the company and instead employs a method used by the tax assessing agency for assessing all like property.

2. Whether in assessing property for ad valorem property tax purposes, reliance by a state agency upon knowledge or information that was not part of the record in the proceedings before the agency denies a company whose property is being assessed the full and fair hearing guaranteed to it by the due process clause of the Fourteenth Amendment.

STATEMENT

The Missouri State Tax Commission assessed petitioner's distributable property that is located in Missouri for purposes of ad valorem taxation at the rate of $33,429,-871.00 under Chapter 151, RSMo 1959, as amended.

A hearing was held before the Commission at which the petitioner introduced three witnesses and the Commission introduced two.

The three witnesses for petitioner were Brady E. Travis, Consulting Valuation Engineer, J. Ed ard Connell, former employee of the Missouri State Tax Commission, and James P. Reedy, General Tax Agent of CB&Q. Basically, the evidence of petitioner was to establish a valuation of petitioner's railroad under a method designated by appellant as the "unit method."

Mr. Travis was introduced as an expert witness and described what petitioner means by the "unit method" of assessment and attempted to apply that method to Missouri. Mr. Travis was cross-examined about the various procedures used in the "unit method" and the particular applicability of this method in this particular valuation.

Mr. Connell was introduced as an expert on the general levels of taxation in Missouri and attempted to show

that property in Missouri is equalized at 25% to 30% of value. Mr. Reedy testified generally to the applicability of the "unit method" of valuation as a sole method of valuation and also as compared to the method used by the Commission. Mr. Reedy also attempted to show that the method used by the Commission results in an excessive and discriminatory assessment.

The Commission produced two witnesses, L. Glenn Key, General Land Agent of CB&Q and Carl A. Norfleet. Supervisor of Taxes, Missouri State Tax Commission.

Mr. Key's testimony was concerned with the value of right of way based on acquisitions and sales of land.

Mr. Norfleet described the method of assessment of the Commission and how the valuation in question was derived. Mr. Norfleet compared the Commission's method to petitioner's "unit method" and also discussed the value of the "unit method."

Simply stated the two methods of valuation are as follows:

A. Petitioner's Unit Method.

This method contemplates an approach to valuing an entire railroad system, enterprise or franchise by averaging two or three separate approaches to value.

1. The first is the net income or capitalized income approach in which the railroad's entire net operating income is averaged for the last five years as reported to the I.C.C. and is then capitalized at 7%. A portion of this figure is allocated to Missouri based on the mileage formula set out in Section 151.060(3), RSMo 1959.

3. The third is the cost or depreciated investment approach which is basically cost less depreciation and sometimes obsolescence. A portion of this figure is then

allocated to Missouri based on the mileage formula set out in Section 151.060(3), RSMo 1959.

The three factors are then averaged and equalized at 30%.

B. The Commission's Method.

The value of the railroad property is determined by appraising the property in the following four steps and then totalling the four values and applying an economic obsolescence factor.

1. A value per mile is placed on each type of track in Missouri.

2. A value per acre is placed upon the number of acres of right-of-way in Missouri.

3. A value is placed upon the buildings and other fixed property on the right-of-way in Missouri.

4. A value is placed on all rolling stock of the railroad based on cost less depreciation with a factor applied to reduce the value. A portion of this value is then allocated to Missouri based on the mileage formula set out in Section 151.060(3), RSMo 1959.

ARGUMENT

I.

What is really involved in this case is which of two methods or approaches to the valuation of petitioner's distributable property should be used by the Missouri State Tax Commission. This is a matter of state law and does not involve the principle relied upon by petitioner as stated in **Norfolk & Western Ry. v. Missouri State Tax Comm'n,** 390 U.S. 317 (1968).

Petitioner states the question as to whether there is a denial of due process when the Commission refused "to consider the evidence" presented by petitioner and instead relies upon "arbitrary and irrational formulas." The question presented by petitioner is thus based upon a false premise that the Commission refused "to consider the evidence" and is refuted by the record and the decision of the court below. We can not state it any better than the Missouri Supreme Court when they said:

> "The Commission's findings demonstrate a detailed recital and examination of the testimony of the railroad's witnesses and exhibits, and upon such examination that evidence was found to lack the credibility attached to the Commission's own presentation in arriving at the assessment. Appellant's charges of refusal to consider its case and protestations of unfair treatment are refuted by this record of nearly 900 pages and the Commission's findings of fact of nearly 62 pages which provide graphic attestation to ample opportunity for C.B.&Q. to present its theory to the Commission and full consideration of that theory by the Commission. The hearing procedure was thus in accord with the provisions of Section 151.060, supra, and appellant's citation. * * *" (A. 8-9)

What the Commission did was to reject the method proposed by the petitioner and instead utilized the method used for the valuation of the property of all railroads in Missouri, which method is authorized by statutory law, Chapter 151, RSMo. The court below approved of the method used by the Commission as being that authorized by Chapter 151, supra, and also approved of the rejection of petitioner's method by the Commission. (A. 9-10) The court below in approving the Commission's method as authorized by law did so with recognition of the real position of petitioner, that its theory of assessment should have

been used to the exclusion of the Commission's theory. (A. 11)

The tax laws involved here are for purposes of ad valorem taxation. Section 151.010, RSMo 1959, provides that the real property, tangible personal property, and intangible personal property of all railroads in Missouri shall be subject to taxation. The statute was enacted pursuant to Sections 4(a) and 5, Article X, Constitution of Missouri.

Section 3, Article X, Constitution of Missouri, provides that taxes may be levied for public purposes only, and shall be uniform on the same class of subjects, and that the methods of determining value of property shall be fixed by law. Section 4(a), Article X, Constitution of Missouri, provides for three classes of property for tax purposes, real, tangible personal and intangible personal property, and permits the legislature to provide for subclasses of tangible and intangible personal property. Section 4(b), Article X, Constitution of Missouri, provides that property in Class 1, real property, and Class 2, tangible personal property, and subclasses of Class 2, shall be assessed at value or such percentage of value as may be fixed by law for each class and subclass.

Pursuant to these constitutional directives Section 151.020, RSMo Supp. 1967, provides that each railroad company in Missouri shall furnish a statement to the Commission setting out in detail the total length of road, the length in Missouri, depots, water tanks and turntables, the length of road in various political subdivisions; and the total number of engines and cars and the actual cash value thereof. A copy of the statement required by Section 151.020, supra, is to be furnished to the various county courts, Section 151.030, RSMo 1959, so that such county

courts can examine the statement and determine the correctness as to the description and the valuation of the property reported, Section 151.040, RSMo 1959.

The Commission is then to assess, adjust and equalize the aggregate value of the property of the railroads, Subsection 1, Section 151.060, RSMo 1959, and is authorized to hold a hearing to do so, Subsection 2 of Section 151.060. Subsection 3 of Section 151.060 directs that a mileage formula be applied exclusively to rolling stock when an interstate railroad is being valued. See **Norfolk & Western Ry. v. Missouri State Tax Comm'n,** supra. The Commission then apportions the aggregate value to the various political subdivisions for assessment purposes according to a mileage formula, Section 151.080, RSMo Supp. 1967. Finally, the decision of the Commission shall be sent to the railroads and political subdivisions setting forth the entire length of the railroad in Missouri and the value per mile; the total value of the rolling stock; and the total length and value of the roadbed. Section 151.090, RSMo Supp. 1967.

Thus, the method of valuation used by the Commission is authorized and directed by Missouri law, as recognized and approved by the court below, as contrasted by the petitioner's method which was rejected as unsound and not applicable.

This case, then, is completely different from those cited by petitioner and there is no conflict of decisions. As stated above, petitioner primarily relies on the rule stated in **Norfolk & Western** (quoted on page 13 of its brief) as follows:

> "Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State." 390 U.S. at 325.

The reason such rule is not applicable here is that the rule applies to allocation formulas. The question in **Norfolk & Western** was whether a mechanical application of Missouri's mileage formula (Section 151.060.3, supra) to the railroad's rolling stock resulted in an allocation to Missouri of property that had no tax situs in Missouri. The railroad showed by uncontroverted evidence that some of its rolling stock had no relationship to Missouri. Hence the inclusion of such rolling stock in the application of the mileage formula resulted in a denial of due process and a violation of the commerce clause.

The petitioner has never in this case, and does not now, contended that Missouri is taxing property not having a tax situs in Missouri. Petitioner has made no complaint about the Commission's application of the mileage formula to the rolling stock, nor does petitioner contend any of the other property valued is not located in Missouri. Therefore, the primary reason that petitioner is asking this Court to grant this writ has no basis in law or fact.

The rules that are applicable from **Norfolk & Western** are stated at 390 U.S. 323 and 324. It is settled that a State may impose a property tax upon its fair share of an interstate transportation enterprise. That fair share may be regarded as the value, appropriately ascertained, employed in the taxing State, including a portion of the intangible, or "going concern" value of the enterprise.

The record clearly shows that the Commission only attempted to value property permanently or habitually employed in Missouri. The Commission ascertained the value according to Missouri law. Petitioner's claim of taking property without due process of law is thus merely a complaint that its method of valuation was rejected by the Commission and the court below. There was no show-

ing by the petitioner that its property in Missouri was valued and assessed differently in relation to other railroad's property or all other property in Missouri. There was no showing that the Commission failed to properly use the method authorized and approved in Missouri, and also no showing, using the method authorized and approved in Missouri, that the assessed valuation made by the Commission was improper.

The question of the value of property for taxation, turns upon its own facts and the methods to be employed are solely a matter of State law. Accordingly, and in view of the fact that the decision of the court below does not conflict with **Norfolk & Western,** this petition for writ of certiorari should be denied.

II.

Respondents do not contest that the petitioner is entitled to a fair hearing. This right was also recognized by the court below. (A. 8) Petitioner had a full hearing and presented its theory of assessment. The Commission's method was also fully explained in the hearing and in the findings of fact and conclusions of law.

Petitioner had its chance to refute the Commission's method of valuation and failed. What the petitioner failed to do was show how the method provided by law and used by the Commission was incorrect and unlawful.

CONCLUSION

The decision below is not in conflict with **Norfolk & Western Ry. v. Missouri State Tax Comm'n,** 390 U.S. 317 (1968), as claimed by the petitioner, because there has been no attempt by the Commission to value property not located in Missouri, and petitioner has not made any such claim. Petitioner had a full hearing before the Commis-

sion and failed to show that its method was a proper method for valuation, and the Commission and the court below could and properly did reject petitioner's method, and the Commission and the court below could and did properly apply the method provided for by Missouri law. The question of valuation turns upon its own facts and is a matter of state law. The petition should be denied.

Respectfully submitted,

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